U.S. Department of Labor

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

BRB No. 19-0294 BLA

LARRY A. TOPPINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEN COAL CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/12/2020
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Granting Benefits (2017-BLA-06152) of Administrative Law Judge Francine L. Applewhite rendered on a claim filed on February 3, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 21.39 years of underground coal mine employment and found that he is totally disabled. 20 C.F.R. §718.204(b)(2). She therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, employer argues the administrative law judge erred in finding claimant established total disability necessary to invoke the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief urging the Board to reject employer's contention the Section 411(c)(4) presumption is unconstitutional.[2]

[1] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption 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. Employer does not challenge the administrative law judge's calculation of claimant's years of qualifying coal mine employment in this case.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of 21.39 years of underground coal mine employment. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 6.

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.[3] 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, 362 (1965).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), Public Law No. 111-148, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 17. Employer cites the district court's rationale in *Texas* that the individual mandate for health insurance coverage contained in the ACA is unconstitutional and the remainder of the law is not severable. *Id*. at 17-19. The Director responds that because the district court stayed its ruling, the decision does not preclude application of the ACA amendments to the Act. Director's Brief at 1.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the individual mandate in the ACA unconstitutional, but vacated the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting). Moreover, the United States Court of Appeals for the Fourth Circuit has held the ACA amendments to the Act[4] are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and that the award of benefits must be vacated for that reason.

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

A claimant 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.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28.

[4] Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)).

§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 consider all relevant evidence and weigh the evidence supporting total disability against the 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).

Employer contends the administrative law judge erred in finding claimant established total disability based on qualifying[5] blood gas studies and Dr. Raj's medical opinion.[6] We agree.

The administrative law judge considered three arterial blood gas studies. The April 25, 2016 blood gas study was non-qualifying for total disability at rest and qualifying for total disability with exercise. Director's Exhibit 15. The October 26, 2016 blood gas study was qualifying for total disability at rest and no exercise testing was performed. Director's Exhibit 23. The January 23, 2018 blood gas study was non-qualifying for total disability at rest and with exercise. Employer's Exhibit 1.

The administrative law judge noted "[t]wo of [claimant's] resting and exercise blood gas values are qualifying" and "[i]n addition the qualifying blood gas values are a result of a fully validated test."[7] Decision and Order at 8. She found the blood gas studies supportive of a finding of total disability "[a]s two of the three blood gas tests produced qualifying values" and "one of the qualifying values was produced during the only validated test." *Id.*; *see* 20 C.F.R. §718.204(b)(2)(ii).

Employer asserts the administrative law judge erred in requiring the blood gas studies to be validated in order to receive probative weight. Employer's Brief at 6. Employer contends the administrative law judge irrationally rejected the non-qualifying

[5] A "qualifying" pulmonary function 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, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[6] The administrative law judge found the pulmonary function studies were non-qualifying for total disability and no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 7-8.

[7] Dr. Gaziano placed a checkmark in a box on a Department of Labor validation form indicating the April 25, 2016 blood gas study was acceptable. Director's Exhibit 14.

January 23, 2018 blood study because "it was not affirmatively validated by an unexplained checkmark validation form." *Id*., *citing Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998).[8] Employer also contends the administrative law judge failed to consider Dr. Zaldivar's testimony regarding the validity of the January 23, 2018 study. *Id*. Alternatively, employer argues that if the administrative law judge is permitted to credit only validated blood gas tests, "she must at least apply [the rule] consistently by giving the qualifying October [26,] 2016 test no weight, as she did the non-qualifying January [23,] 2018 test." *Id*. Employer's arguments have merit.

The administrative law judge failed to explain why the April 25, 2016 blood gas study is more reliable based on Dr. Gaziano's validation report, as Dr. Gaziano provides no explanation for his conclusion. *Hicks*, 138 F.3d at 530. The administrative law judge also failed to adequately explain why she rejected the January 23, 2018 non-qualifying study. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The regulations provide that in evaluating the blood gas study evidence, the administrative law judge should consider whether a study substantially conforms to the quality standards set forth in 20 C.F.R. §718.105 and Part 718, Appendix C. *See* 20 C.F.R. §718.101(b) (providing that "any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"); *see also Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). Here, the administrative law judge did not discuss the quality standards or identify any bases for finding the January 23, 2018 non-qualifying study invalid based on those standards. Decision and Order at 8.[9] Moreover, the record reflects that no physician indicated the January 23, 2018 study is invalid.

---

[8] In *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998), the administrative law judge credited an earlier qualifying blood gas study Dr. Rasmussen conducted over later non-qualifying studies because the earlier study was the only one an independent physician validated. *Id*. at 530. The Fourth Circuit Court vacated the administrative law judge's determination because the physician "merely checked a box verifying that the test was technically acceptable" and "provided no reasons for his opinion" such that "his validation lent little additional persuasive authority" to the earlier study. *Id*.

[9] In so doing, it appears that the administrative law judge has applied a factor without establishing any basis for doing so and, moreover, has applied it selectively as employer argues. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984); Employer's Brief at 6. Further, in not considering all of the resting and exercise blood gas testing, she has not considered all of the relevant

As employer accurately notes, Dr. Zaldivar testified regarding the blood gas study evidence. He opined all of the objective testing from Dr. Raj's January 23, 2018 examination appeared valid except for the lung volume results. Employer's Exhibit 2 at 42. Based on Dr. Raj's blood gas study, Dr. Zaldivar opined the blood gas results he obtained when he examined claimant on October 26, 2016 were not accurate. *Id*. at 45. He further opined the improvement in the blood gas studies from showing severe hypoxemia in 2016 to normal values in 2018 suggested the earlier blood gas study results were due to an "an acute problem." *Id*. at 43. The administrative law judge erred in failing to address Dr. Zaldivar's testimony in determining the weight to accord the January 23, 2018 blood gas study. *See* 30 U.S.C. §923(b) (the fact finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Because the administrative law judge did not adequately explain her rejection of the January 23, 2018 study or how she resolved the conflict in the blood gas study evidence, her decision does not satisfy the Administrative Procedure Act (APA).[10] We therefore vacate her determination that the blood gas studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

With regard to the medical opinion evidence, employer also correctly contends the administrative law judge erred in discrediting Dr. Zaldivar's opinion that claimant is not totally disabled. The administrative law judge considered the medical opinions of Drs. Raj and Zaldivar. Dr. Raj opined claimant is totally disabled because the April 25, 2016 blood gas study showed severe hypoxemia and claimant complained of severe shortness of breath, cough, and wheezing. Director's Exhibits 15, 25. In his initial report, Dr. Zaldivar diagnosed claimant as totally disabled based on the results of the April 15, 2016 and October 26, 2016 blood gas studies. Director's Exhibit 23 at 6. During his deposition, Dr. Zaldivar reviewed Dr. Raj's January 23, 2018 blood gas study results and opined claimant currently has no respiratory impairment and is not totally disabled based on the

---

evidence which is required. *See Gray v. Director, OWCP*, 943 F.2d 513, 520-21 (4th Cir. 1991).

[10] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires the administrative law judge to set forth her "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

pulmonary function study evidence and the non-qualifying January 23, 2018 blood gas study results. Employer's Exhibit 2 at 21.

The administrative law judge rejected Dr. Zaldivar's opinion because he "relied on testing that was not validated." Decision and Order at 11. She further noted Dr. Zaldivar did not take into account claimant's twenty-one year history of underground coal dust exposure or explain "why the presence of 'pulmonary fibrosis' is not related [to] the [c]laimant's simple coal workers' pneumoconiosis." *Id*. Giving full weight to Dr. Raj's opinion, the administrative law judge found claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11.

Because the administrative law judge did not adequately explain her weighing of the conflicting blood gas studies, we vacate her finding that Dr. Zaldivar's opinion is not reasoned. *See Wojtowicz*, 12 BLR at 1-165. Further to the extent the administrative law judge discredits Dr. Zaldivar's opinion for not addressing the cause of claimant's pulmonary fibrosis, her analysis improperly conflates the issues of total disability and disease or disability causation. 20 C.F.R. §718.204(b)(2), (c). The proper inquiry at 20 C.F.R. §718.204(b)(2) is whether claimant has established a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c).

We also agree with employer the administrative law judge erred in summarily crediting Dr. Raj's opinion without addressing whether it is sufficiently reasoned to support claimant's burden of proof. *See Hicks*, 138 at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997). We therefore vacate the administrative law judge's finding that claimant established total disability based on the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv), and her overall determination claimant is totally disabled and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b), 718.305.

Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we address the administrative law judge's findings on rebuttal because we agree with employer they do not satisfy the APA. Employer's Brief at 12-17.

Once the Section 411(c)(4) presumption is invoked, the burden shifts to employer to establish claimant has neither legal nor clinical pneumoconiosis,[11] or "no part of [his]

[11] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as

respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish either method of rebuttal. Employer contends the administrative law judge failed to explain why it did not disprove legal pneumoconiosis. We agree.

The administrative law judge noted both Drs. Raj and Zaldivar diagnosed "coalworkers' pneumoconiosis" and found employer "failed to establish by a preponderance of credible medical evidence that [claimant] does not suffer from clinical or legal pneumoconiosis." Decision and Order at 15. She specifically noted "[t]he x-ray evidence and medical opinions do not rebut the presence of clinical pneumoconiosis, and the most probative medical opinions, and radiographic evidence suggests the presence of legal pneumoconiosis." *Id.* at 14-15 (citations omitted).

We affirm, as unchallenged on appeal, the administrative law judge's finding employer did not disprove clinical pneumoconiosis. *See Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-15; Employer's Brief at 12. Employer correctly asserts, however, the administrative law judge's findings on legal pneumoconiosis are unclear and that she does not address the conflict in the relevant evidence.[12] Employer's Brief at 14-15. Although Dr. Raj diagnoses legal pneumoconiosis, Dr. Zaldivar does not. Dr. Zaldivar specifically opined that while claimant has radiographic evidence of clinical coal workers' pneumoconiosis, he has no respiratory or pulmonary impairment. Employer's Exhibit 2 at 21; Employer's Exhibit 3 at 2. Dr. Zaldivar further opined claimant's pulmonary fibrosis is unrelated to coal mine dust exposure. Employer's Exhibit 3 at 2. Because the administrative law judge did not

---

pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[12] Employer's failure to disprove clinical pneumoconiosis necessarily precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). However, the administrative law judge must determine whether employer has disproved legal pneumoconiosis in order to provide a framework for consideration of the second method of rebuttal – whether employer established that "no part of [claimant's] respiratory or pulmonary disability is due to pneumoconiosis as defined at 20 C.F.R. §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

adequately explain her determination that employer failed to disprove legal pneumoconiosis, we vacate it. *See Wojtowicz*, 12 BLR at 1-165.

Additionally, the administrative law judge found employer did not rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary disability was due to pneumoconiosis. Decision and Order at 16. In addressing disability causation, she noted Dr. Zaldivar diagnosed pulmonary fibrosis and stated only that "Dr. Zaldivar did not present a reasoned explanation as to why [] claimant's 21 year history of underground coal mine dust exposure was not a contributing or aggravating factor to his pulmonary impairment."[13] *Id*. Because the administrative law judge did not adequately explain why Dr. Zaldivar's opinion was unreasoned, we vacate her finding. Thus, we vacate the administrative law judge's determination employer did not rebut the Section 411(c)(4) presumption.

Remand Instructions

The administrative law judge must reconsider whether claimant established total disability. She must reconsider the blood gas studies and Dr. Zaldivar's deposition testimony and must provide an adequate rationale for how she resolves the conflict in the relevant evidence. She must explain the weight she accords the conflicting medical opinions of Drs. Raj and Zaldivar on total disability based on her consideration of the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. If the administrative law judge finds either the blood gas studies or medical opinions support a finding of total disability, she must weigh all of the relevant evidence together to determine whether claimant is totally disabled and can invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

If the Section 411(c)(4) presumption is invoked, the administrative law judge must reconsider whether employer can rebut it. She must determine whether employer disproved legal pneumoconiosis by establishing claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Griffith v. Terry Eagle Coal Co.*, 25 BLR 1-223, 1-229 (2017). Thereafter, the administrative law judge must reconsider whether employer established no part of claimant's respiratory disability is due to either clinical or legal pneumoconiosis. 20

[13] Dr. Zaldivar opined the pulmonary fibrosis was not causing any respiratory impairment. Employer's Exhibit 3 at 2.

C.F.R. §718.305(d)(1)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). In rendering her findings on remand, the administrative law judge must explain the bases for her credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge