U.S. Department of Labor

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

BRB No. 19-0295 BLA

JOHN S. GEORGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COMMERCIAL TESTING & ENGINEERING COMPANY	)	DATE ISSUED: 06/09/2020
	)	
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 Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Michael D. Crim (Crim Law Office, PLLC), Clarksburg, West Virginia, for employer.

Gary K. Stearman (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: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2018-BLA-05057) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed on July 28, 2015, 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 less than fifteen years of coal mine employment based on the parties' stipulation,[1] and thus found he 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) (2012). Considering entitlement under 20 C.F.R. Part 718, the administrative law judge found claimant failed to establish a totally disabling respiratory or pulmonary impairment, and therefore denied benefits. 20 C.F.R. §718.204(b)(2).

On appeal, claimant contends the administrative law judge erred in finding he is not totally disabled. He also argues the district director did not provide him a complete pulmonary evaluation as required by the Act. 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response agreeing with claimant's argument that the administrative law judge erred in finding he is not totally disabled, but maintaining she satisfied her obligation to provide claimant with a complete pulmonary evaluation. Claimant has filed a reply brief, reiterating his arguments.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Denying Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 (1965).

[1] Although the administrative law judge indicated claimant's coal mine employment occurred in Kentucky, Decision and Order at 3, the record reflects it occurred in Ohio. Director's Exhibit 3; Hearing Transcript at 21-22. Regardless, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Under Section 411(c)(4), 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 impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. We affirm, as unchallenged on appeal, the finding claimant has less than fifteen years of coal mine employment and cannot invoke the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

To be entitled to benefits under the Act, 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 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 the relevant 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).

Total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable diagnostic techniques, concludes the miner's respiratory or pulmonary condition prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv). The administrative law judge weighed the opinions of Drs. Feicht and Conibear that claimant is totally disabled and the opinion of Dr. Spagnolo that he is not. Decision and Order at 8-12. He found Dr. Spagnolo's opinion more persuasive, and therefore found this evidence does not establish total disability. *Id*.

Claimant and the Director argue the administrative law judge erred in finding the medical opinions do not establish total disability.[3] 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 5-14; Director's Brief at 4-5. These arguments have merit.

Although claimant's August 25, 2015 objective testing was non-qualifying,[4] Dr. Feicht noted claimant's arterial blood gas testing is consistent with mild resting hypoxemia

[3] As they are unchallenged, we affirm the findings claimant did not establish total disability based on pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 8.

[4] 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 his pulmonary function testing "is borderline abnormal" with an FEV1 that is 62% predicted and FVC that is 60% predicted. Director's Exhibit 12 at 7. He opined the pulmonary function testing evidences mild restrictive and obstructive pulmonary impairments. *Id*. He concluded claimant is totally disabled from his usual coal mine employment[5] based on "moderately severe" symptoms of dyspnea and exercise intolerance supported by pulmonary function and blood gas testing. Claimant's Exhibit 3; *see* Director's Exhibits 13, 15.

Dr. Conibear reviewed Dr. Feicht's August 25, 2015 objective test results. Claimant's Exhibit 2. She also reviewed a September 19, 2016 pulmonary function study[6] and noted the pre-bronchodilator "FEV1 was 55% predicted" and "FVC 59% predicted." *Id*. at 2-3. She found this study consistent with "mild restrictive physiology" and "moderate obstruction." *Id*. She concluded claimant is totally disabled from his usual coal mine employment that "required [him] to shovel coal and repeatedly lift and carry containers of coal weighing ten to twenty-five pounds throughout the work day."[7] *Id*. at 5. She explained claimant's "reported level of dyspnea" is "supported by objective evidence from his spirometrv and blood gas [testing] and would preclude this level of exercise." *Id*. She further explained claimant has a "low normal resting arterial oxygen level and reports [of] shortness of breath with relatively minor exertion." *Id*.

Dr. Spagnolo opined claimant's "lung testing shows no evidence of an obstructive lung defect" and "resting arterial blood gases are normal." Employer's Exhibit 6 at 6.

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and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] Dr. Feicht noted claimant most recently worked as a coal sampler, which required him to take "coal out of trucks." Director's Exhibit 12. He stated this job involved sitting four and one-half hours a day, standing four and one-half hours a day, and lifting twenty-pounds ten times a day. *Id*.

[6] This study was performed by Dr. Sedmak at Chalmers P. Wiley Ambulatory Care Center. Claimant's Exhibit 1.

[7] Dr. Conibear stated claimant's most recent coal mine employment required him to work with "unwashed coal which the trucks dumped into a hopper where he worked-- this dumping created a lot of dust." Claimant's Exhibit 2 at 4. Claimant would "bag samples from the hopper and carry these bags chest high about 20 feet to a crusher. The bags he carried weighed 10 pounds but could be as big as 25 pounds." *Id*. Claimant also "crushed and tested the coal. He had to shovel spillage from around the crusher. He then tagged the bags and carried them back out. He worked 8-10 hours per day at this job." *Id*.

Therefore, he opined there "is no evidence of a disabling respiratory impairment" and claimant is not disabled from his usual coal mine employment.[8] *Id.*

In evaluating these opinions, the administrative law judge first erred by conflating the issue of total disability with that of disability causation. Specifically, he found coronary artery disease and deconditioning "remain possible explanations for [claimant's pulmonary] symptoms," particularly when the objective tests are "reflective of only a 'mild' degree of lung impairment." Decision and Order at 8-10. He was not persuaded Dr. Feicht "knows the reason for these symptoms," including whether they are "due to his lungs, his heart, or deconditioning." *Id*. He found Dr. Feicht did not explain why the length of claimant's coal mine employment would have "any effect on [claimant's] degree of impairment" and failed to discuss coal mine dust exposure versus coronary artery disease and deconditioning as a cause of claimant's disability. *Id*. Similarly, he found Dr. Conibear did not adequately address claimant's "history of coronary artery disease and deconditioning," which could be "causing his exertional dyspnea and exercise intolerance." *Id*. 10-11. Finally, he found Dr. Spagnolo's opinion is the most persuasive because the doctor "expressly [took] into account [claimant's] heart disease as a possible cause of his respiratory symptoms." *Id*. at 11-12.

The administrative law judge thus erroneously required the doctors to address claimant's coronary artery disease and deconditioning as a possible cause of his disabling pulmonary symptoms and impairments. The relevant inquiry at 20 C.F.R. §718.204(b)(2) solely is whether claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(a), (b)(2). The cause of that impairment is relevant to the issue of disability causation at 20 C.F.R. §718.204(c).

Further, the administrative law judge discredited Dr. Feicht's opinion because he determined the doctor provided "conflicting" opinions as to whether claimant is totally disabled.[9] Decision and Order at 8-10. In rendering this credibility finding, the

[8] Dr. Spagnolo indicated claimant was required to do some manual labor in his last coal mining job, but from claimant's description it was not heavy manual labor. Employer's Exhibit 6 at 5.

[9] The administrative law judge found Dr. Feicht did not initially attribute claimant's pulmonary symptoms to his cardiac issues, but in a subsequent report indicated coronary artery disease and deconditioning could cause these pulmonary symptoms rather than an intrinsic lung process. Decision and Order at 8-10. As discussed above, this inquiry is relevant to determining the cause of any disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c).

administrative law judge mischaracterized Dr. Feicht's conclusions. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983).

Dr. Feicht consistently diagnosed claimant as totally disabled. In his initial report, he noted claimant suffers from wheezing and dyspnea on exertion. Director's Exhibit 12 at 6. He indicated claimant "is barely able to climb [one] flight of stairs without stopping," experiences "dyspnea on ordinary daily activities such as walking around K-Mart[,] and is unable to lift more than 20 to 30 pounds" or do tasks such as "yardwork [and] snow shoveling." *Id*. He also specified claimant cannot walk more than one-hundred yards on a flat surface, thirty yards on an incline, or one-half flight of stairs before having to stop because of the dyspnea. *Id*. at 8. He attributed these limitations to claimant's "degree of respiratory symptoms." *Id*. Based on dyspnea and exercise intolerance supported by blood gas and pulmonary function testing, Dr. Fiecht concluded claimant is totally disabled "from a pulmonary perspective." *Id*. at 9.

In a supplemental report, he reiterated claimant "has borderline low objective criteria for disability as previously described," but further indicated claimant "has moderately severe symptoms" that would prevent him from performing his usual coal mine employment. Claimant's Exhibit 3. Although Dr. Feicht amended his opinion with respect to the cause of claimant's disability, he did not change his opinion that claimant is totally disabled.[10] Director's Exhibits 12, 15; Claimant's Exhibit 3.

The administrative law judge also erred in discrediting Dr. Conibear's opinion[11] because the pulmonary function and arterial blood gas studies are non-qualifying. Decision

[10] In his initial report based on his August 25, 2015 examination, Dr. Feicht concluded claimant's chronic bronchitis, bronchospasm, and exertional dyspnea are due to seventeen and one-half years of coal mine dust exposure, and these impairments are "very substantial" contributors to claimant's total disability. Director's Exhibit 12 at 9-10. When the district director asked him to assume claimant has seven years of coal mine employment, he responded claimant's coal mine employment "is not sufficient to account for a disabling pulmonary disability." Director's Exhibit 15. He identified "other elements" as factors in the disability, including deconditioning and presumed cardiomyopathy from coronary artery disease. *Id*. When claimant's counsel asked Dr. Feicht to assume an employment history of eleven or more years, he indicated he would "revert" to his "original conclusion" of legal pneumoconiosis. Claimant's Exhibit 3.

[11] The administrative law judge also erred to the extent he rejected Dr. Conibear's opinion because she did not personally examine claimant. Decision and Order at 10. An administrative law judge cannot discredit a medical opinion solely because the physician did not examine the miner, but must consider the reliability and reasoning underlying the

and Order at 8-10. The administrative law judge discredited Dr. Conibear for relying on blood gas testing the doctor characterized as "low" but "still considered within the range of normal" and pulmonary function testing that is "borderline abnormal" but consistent with dyspnea. Decision and Order at 9-10. Contrary to the administrative law judge's analysis, total disability can be established with reasoned medical opinions even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability even though the underlying objective studies are non-qualifying.[12] *See 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").

Finally, the administrative law judge erred in failing to render a finding as to the exertional requirements of claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). In light of the foregoing errors, we must vacate the finding claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). Thus, we also vacate the administrative law judge's denial of benefits.

On remand, in considering whether claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must render a finding as to the exertional requirements of claimant's usual coal mine work[13] and consider them in conjunction with

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opinion. *See Collins v. J & L Steel* (*LTV Steel*), 21 BLR 1-181, 1-189 (1999); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984).

[12] The administrative law judge found Dr. Conibear's opinion is based only on Dr. Feicht's analysis of the August 25, 2015 pulmonary function and arterial blood gas testing in which he indicated the studies are "'borderline abnormal,' 'borderline normal,' and reflective of only a mild obstructive and restrictive process . . . ." Decision and Order at 10-11. Dr. Feicht also indicated, however, the "flow volume curves" for the pulmonary function study "were somewhat contracted suggesting an element of both obstructive and restrictive process." Director's Exhibit 15. Moreover, as discussed above, Dr. Conibear also reviewed a September 19, 2016 pulmonary function study and opined it is consistent with "mild restrictive physiology" and "moderate obstruction." Claimant's Exhibit 2. Although this study is non-qualifying under the regulations, it produced qualifying FEV1 values. 20 C.F.R. Part 718, Appendix B.

[13] Claimant's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

the medical opinions assessing disability. He must also consider the qualifications of the respective physicians, the documentation and reasons underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. If the administrative law judge determines the medical opinions demonstrate total disability, 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 Shedlock*, 9 BLR at 1-198.

If claimant establishes total disability, the administrative law judge must determine whether claimant has established that pneumoconiosis arising out of coal mine employment substantially contributed to his disability. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. He must also render a specific determination as to the length of claimant's coal mine employment as it may affect his findings on these remaining elements of entitlement. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993) (en banc).

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. On all issues, the administrative law judge must set forth his findings in detail and explain his underlying rationale in accordance with the Administrative Procedure Act.[14] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Complete Pulmonary Evaluation

Claimant asserts that because Dr. Feicht examined him as part of the Department of Labor examination, and the administrative law judge found Dr. Feicht did not address the impact of claimant's heart disease on his impairment, the Director did not fulfill her obligation to provide him with a complete pulmonary evaluation. Claimant's Brief at 15-17. The Director and employer respond, asserting Dr. Feicht's report fulfilled the Director's obligation to provide claimant with a complete pulmonary evaluation. Director's Brief at 5-6; Employer's Brief at 9-10. Claimant replies that Dr. Feicht's opinion makes clear he "did not understand the essential elements of eligibility," and therefore his opinion is insufficient to meet the Director's obligation. Claimant's Reply Brief at 6. We agree with the position of the Director and employer.

The Act requires "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C.

[14] 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).

§923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The Department "fulfills its obligations . . . by providing 'a medical opinion that addresses all of the essential elements of entitlement.'" *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009), *quoting Smith v. Martin County Coal Corp*., 233 F.App'x. 507, 512 (6th Cir.2007). It is not required, however, to provide an evaluation sufficient to meet claimant's burden of proof. *Id*. at 642. Thus, a finding that a physician is unpersuasive "is not the same as failing to address the essential elements of entitlement." *Id*. at 640, *citing Gallaher v. Bellaire Corp*., 71 F.App'x. 528, 531 (6th Cir.2003). Because Dr. Feicht performed all of the required tests and provided an opinion addressing each element of entitlement, claimant received a complete pulmonary evaluation sufficient to satisfy the Act's requirements. *Id*.; Director's Exhibits 13, 15; Claimant's Exhibit 3.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge