U.S. Department of Labor

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

BRB No. 19-0297 BLA

STEWART L. YOUNG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL RIDGE MINING CORPORATION	)	
	)	DATE ISSUED: 06/25/2020
Employer-Petitioner	)	
	)	
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 on Modification of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (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 appeals the Decision and Order Awarding Benefits on Modification (2016-BLA-05643) of Administrative Law Judge Carrie Bland rendered in a claim filed on June 5, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

In her September 25, 2012 Decision and Order Denying Benefits, Administrative Law Judge Linda S. Chapman found claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 92. Thus she found he could not invoke 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). Because claimant failed to establish an essential element of entitlement, she denied benefits. Director's Exhibit 92.

Claimant requested modification of that denial.[2] Director's Exhibit 119. In her February 26, 2019 Decision and Order that is the subject of this appeal, Judge Bland (the administrative law judge) credited claimant with nineteen years of coal mine employment, at least sixteen years in underground coal mines,[3] and found he is totally disabled. 20 C.F.R. §718.204(b)(2). She thus found claimant established a mistake in a determination of fact, 20 C.F.R. §725.310, and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. She further found employer did not rebut the presumption and awarded benefits.

On appeal,[4] employer challenges the administrative law judge's finding claimant established total disability necessary to invoke the Section 411(c)(4) presumption. It also contends she erred in finding the presumption not rebutted. It further asserts she erred in

[1] Under Section 411(c)(4), 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 impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] This case involves claimant's fourth request for modification. Director's Exhibit 119. Claimant previously filed three requests for modification. Director's Exhibits 93, 102, 116. The district director denied all three requests. Director's Exhibits 101, 115, 118.

[3] We affirm these rulings as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

finding claimant established a basis for modifying the Judge Chapman's denial of benefits. 20 C.F.R. §725.310. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of employer's argument that the administrative law judge erred in applying the standard for establishing modification.

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. 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).

We first reject employer's argument that a request for modification must be denied when claimant fails to establish a change in conditions. Employer's Brief at 5-7 (unpaginated). The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999). As noted above, the administrative law judge found claimant established modification based on a mistake in a determination of fact.

Further, contrary to employer's assertion, when evaluating whether claimant established a mistake of fact, the administrative law judge was not required to set forth an error in the credibility findings Judge Chapman made. Employer's Brief at 7-10 (unpaginated). The procedure to establish a basis for modification "is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings." *Stanley*, 194 F.3d at 497. The administrative law judge "is in no way bound by the findings supporting the original denial," and modification is a "de novo review" process. *Id*. at 499. A party is not required to submit new evidence because an administrative law judge has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Stanley*, 194 F.3d at 497. Any "mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

There is, however, merit to employer's argument the administrative law judge erred in finding claimant established 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.[5] *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.[6] 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).

Arterial Blood Gas Studies

The parties submitted to Judge Chapman six arterial blood gas studies conducted on September 14, 2009, November 18, 2009, March 2, 2010, December 16, 2010, February 2, 2012, and February 21, 2012. 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibits 10, 11, 13, 77 (internally Claimant's Exhibits 2, 3), 79 (internally Employer's Exhibit 5). None of these studies produced qualifying[7] values for total disability at rest. *Id*. The September 14, 2009, March 2, 2010, and February 21, 2012 studies produced qualifying values with exercise, whereas the December 16, 2010 and February 2, 2012 studies produced non-qualifying values with exercise.[8] *Id*. Employer also submitted a March 24, 2017 blood gas

[5] The administrative law judge noted claimant's most recent coal mine employment involved running a shuttle car and "hauling coal." Decision and Order at 4, *citing* Hearing Transcript at 12-17. Claimant indicated he drove "the shuttle car up and down to the mine face," "lift[ed] timbers, and help[ed] load the buggy." *Id*. He lifted timber a "couple of times a day" and "spent a couple hours of his day out of the shuttle car, shoveling the belt and dust." *Id*. The administrative law judge found this employment involved work "at a medium to heavy exertional level." Decision and Order at 4. This finding is affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711.

[6] The administrative law judge found claimant failed to establish a change in conditions or mistake in a determination of fact based on the pulmonary function study evidence, and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 12-13.

[7] A "qualifying" 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, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

[8] The November 18, 2009 study contained no exercise blood gas test results. Director's Exhibit 13.

study in conjunction with the modification proceeding. Employer's Exhibit 2. This study produced qualifying values at rest, but non-qualifying values with exercise. *Id*.

The administrative law found the preponderance of the exercise blood gas studies are qualifying. Decision and Order at 12. Based on that finding, and because the "current" March 24, 2017 resting study is qualifying, she determined the blood gas testing established total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12. We agree with employer's argument the administrative law judge's basis for resolving the conflict in the blood gas study evidence fails to satisfy the explanatory requirements of the Administrative Procedure Act[9] (APA). *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Brief at 11-13 (unpaginated). The administrative law judge did not explain how the preponderance of the exercise blood gas tests are qualifying insofar as the current record on modification now contains three qualifying and three non-qualifying studies taken during exercise. *Id*. She further did not explain why she credited the qualifying resting portion of the March 24, 2017 study over the non-qualifying studies, including the exercise portion of the March 24, 2017 study. *Id*. Thus, we vacate the administrative law judge's finding the arterial blood gas studies established total disability. 20 C.F.R. §718.204(b)(2)(ii). On remand, she must reconsider whether claimant established total disability based on the blood gas studies and render findings that satisfy the APA. *Wojtowicz*, 12 BLR at 1-165.

Medical Opinions

The administrative law judge noted Drs. Rasmussen and Habre diagnosed claimant as totally disabled by a respiratory or pulmonary impairment, while Drs. Fino, Hippensteel, and McSharry opined he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12-14; Director's Exhibits 10, 11, 77 (internally Claimant's Exhibits 2, 3), 79 (internally Employer's Exhibits 5, 9-10); Employer's Exhibits 1, 4. She also noted claimant testified "he uses supplemental oxygen at night, and as needed during the day," and medical treatment records "from Dr. Green reflect that [claimant] was diagnosed with hypoxia." Decision and Order at 13; *see* Claimant's Exhibit 3; Hearing Transcript at 12-13. She noted that Dr. Green indicated claimant "had been on three liters of supplemental oxygen for the last three years." *Id*.

[9] The Administrative Procedure Act (APA) provides that every adjudicatory decision must include "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).

The administrative law judge found the opinions of Drs. Fino and Hippensteel unpersuasive because she determined they focused on the cause of claimant's gas exchange impairment and did not adequately address whether it is disabling. Decision and Order at 12-14. She also found Dr. McSharry's opinion unpersuasive because he focused on claimant's pulmonary function testing but did not discuss whether his arterial blood gas testing evidences a respiratory impairment. *Id*. She found claimant established total disability because the "treatment records, as well as the arterial blood gas findings, and especially the [c]laimant's need for supplemental oxygen" establish he is totally disabled. *Id*.

Employer generally argues the administrative law judge erred in discrediting the opinions of Drs. Fino and Hippensteel. Employer's Brief at 19. We decline to address this issue, as employer has not included a specific supporting argument. 20 C.F.R. §802.211; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Further, because employer does not challenge the administrative law judge's rationale for rejecting Dr. McSharry's opinion, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Akers*, 131 F.3d at 439-40.

Employer argues the regulations preclude an award of miner's benefits based on treatment records. Employer's Brief at 17-18. However, employer fails to recognize that a physician need not phrase his or her opinion specifically in terms of "total disability" to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *Black Diamond Coal Co. v. Benefits Review Board*, 758 F.2d 1532, 1534 (11th Cir. 1985). Moreover, treatment records may be supportive of a finding of total disability. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole*, 897 F.2d at 894. There is merit, however, to employer's argument that the mere fact oxygen was prescribed in claimant's treatment records does not establish the medical necessity of the prescription or that claimant has a totally disabling condition. In this case, the administrative laws judge failed to adequately explain how claimant's prescription of oxygen and his treatment records overall support her total disability determination as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

Because the administrative law judge's evaluation of the blood gas study evidence affected her weighing of the treatment records on total disability, and because she has not adequately explained her evaluation and weighing of the treatment record evidence, we also vacate her finding this evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv); *Wojtowicz*, 12 BLR at 1-165.

Finally, we agree with employer's contention that although the administrative law judge summarized the medical opinions of Drs. Rasmussen and Habre diagnosing total

disability, she did not render the necessary explanation and findings as to whether they are reasoned and documented. Decision and Order at 13-14; Employer's Brief at 19. It is the role of the trier of fact to make such determinations and to properly explain them. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *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). Thus on remand the administrative law judge should also evaluate whether the opinions of Drs. Rasmussen and Habre establish total disability.[10] 20 C.F.R. §718.204(b)(2)(iv). She must take into account the physicians' qualifications, the explanations given for their findings, the documentation underlying their judgments, and the sophistication and bases for their diagnoses. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40.

Because we have vacated the administrative law judge's findings that the blood gas testing and medical opinions establish total disability, we vacate her finding claimant established a mistake in a determination of fact, invoked the Section 411(c)(4) presumption,[11] and is entitled to benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.310. On remand, the administrative law judge must reconsider whether the blood gas study and medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(ii), (iv). If the administrative law judge finds total disability established based on either type of evidence or both, considered in isolation, she must determine whether claimant is totally disabled taking into account the contrary probative evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

[10] A physician can offer a reasoned medical opinion diagnosing total disability even though the underlying objective studies are non-qualifying. *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").

[11] We decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to rebut the Section 411(c)(4) presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge's rebuttal findings.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge