U.S. Department of Labor

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

BRB No. 19-0314 BLA

RONDAL R. COSBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T AND T FUELS, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 06/30/2020
	)	
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Rondal R. Cosby, Harrogate, Tennessee.

Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2016-BLA-05818) of Administrative Law Judge Morris D. Davis rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on July 27, 2015.[2]

Although the administrative law judge credited Claimant with 19.56 years of surface coal mine employment,[3] he found Claimant failed to establish at least fifteen of those years occurred in conditions substantially similar to an underground mine. He therefore found Claimant could not invoke the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). Considering the claim without the benefit of the Section 411(c)(4) presumption, the administrative law judge found Claimant failed to prove legal pneumoconiosis but established clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203. However, he found the evidence did not establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b), and denied benefits.

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

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on Claimant's behalf that the 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] Claimant filed a claim in 2014, but subsequently withdrew it. *See* Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[3] Claimant's coal mine employment occurred in Kentucky. Hearing Transcript at 34. Accordingly, 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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

As Claimant filed this appeal without the assistance of counsel, the Benefits Review Board considers whether substantial evidence supports the decision and order. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are 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).

To be entitled to benefits, 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). Statutory presumptions may assist Claimant in establishing these elements of entitlement.[5]

The Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

The presumption of total disability due to pneumoconiosis at Section 411(c)(4) requires Claimant to establish at least fifteen years of coal mine employment either in "underground coal mines" or in "coal mines other than underground coal mines" in conditions "substantially similar" to those in an underground mine. Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if . . . the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge accurately noted all of Claimant's coal mine employment occurred on the surface, either operating a bulldozer or driving a truck. Decision and Order at 4; Hearing Transcript at 23. He further noted Claimant testified his coal dust exposure was most severe when he worked as a bulldozer operator, a position he held for the three or four months when he first started his coal mine employment. Decision and Order at 9 citing Hearing Transcript at 19-20; Director's Exhibit 8 at 13-14. He also

[5] The administrative law judge accurately found no evidence of complicated pneumoconiosis in the record. Decision and Order at 23. Claimant, therefore, cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

noted Claimant testified "in some detail" about his coal dust exposure during the "nearly nine years" he worked as a truck driver for Employer. *Id.*

The administrative law judge found, however, that Claimant did not testify about his coal mine dust exposure while working for other coal mine operators. Decision and Order at 9. Based upon his review of the record, the administrative law judge found no information about Claimant's exposure to coal mine dust while working for coal mine operators other than Employer (with the exception of the few months he operated a bulldozer). *Id.* Consequently, the administrative law judge determined Claimant did not establish he was regularly exposed to coal mine dust for fifteen years. *Id.*

Contrary to the administrative law judge's characterization, the record contains evidence relevant to Claimant's coal dust exposure during the time he worked for other coal operators. On his Employment History form (CM-911), Claimant indicated he was exposed to dust while working for K & K Coal, Rainbow Valley Fuel, Apollo Fuels, DKD Contractors, Apple Coal Company, and Mining Technologies. *See* Director's Exhibit 4. Moreover, in answering Employer's interrogatories, Claimant indicated (by checking "yes") that he was "exposed to dust on all [coal mine] job[s]." *See* Director's Exhibits 6, 7.

An administrative law judge is required to consider all relevant evidence. Consequently, we vacate the administrative law judge's finding that Claimant failed to establish at least fifteen years of qualifying coal mine employment. Before any determination can be made regarding whether Claimant was regularly exposed to coal mine dust for at least fifteen years, the case must be remanded to the administrative law judge to consider and weigh *all evidence* related to Claimant's coal dust exposure.[6] *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019). Only after such an evaluation of relevant, creditable evidence is completed on remand should the administrative law judge

[6] Claimant's Social Security Administration earnings statement indicates he earned $3,972.00 from DKD Contractors in 1990. Director's Exhibit 9. Although the administrative law judge characterized this employment as "coal mine related," *see* Decision and Order at 4; Hearing Transcript at 26, he did not credit Claimant with any coal mine employment for this work. Decision and Order at 7. On remand, the administrative is instructed to consider whether Claimant is entitled to credit for additional coal mine employment based upon his employment with DKD Contractors.

determine whether Claimant has established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Totally Disabling Respiratory or Pulmonary Impairment

In order to invoke the Section 411(c)(4) presumption, Claimant must also establish a totally disabling respiratory or pulmonary impairment. A miner is totally disabled if his pulmonary or respiratory impairment, 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).

The administrative law judge considered four pulmonary function studies conducted on July 25, 2014, August 24, 2015, January 27, 2016, and August 4, 2016. The July 25, 2014 study produced qualifying values[7] before administration of a bronchodilator. Claimant's Exhibit 3. The August 24, 2015 study produced qualifying values before administration of a bronchodilator but non-qualifying values after administration of a bronchodilator. Director's Exhibit 11. The remaining two pulmonary function studies conducted on January 27, 2016, and August 4, 2016 produced non-qualifying values before and after administration of a bronchodilator.[8] Director's Exhibit 14; Claimant's Exhibit 4; Employer's Exhibit 1.

[7] 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).

[8] The administrative law judge did not list all the values the January 27, 2016 pulmonary function study produced. The study produced a pre-bronchodilator MVV value that is qualifying. Director's Exhibit 14. This value, along with the qualifying pre-bronchodilator FEV1 value the study produced, would render the study qualifying under the regulations. We note, however, that Dr. Dahhan who conducted the January 27, 2016 study testified that the MVV value the study produced is invalid. Employer's Exhibit 5 at 8-9.

The administrative law judge found Dr. Vuskovich invalidated the results of the qualifying pulmonary function studies conducted on July 25, 2014, and August 24, 2015. The administrative law judge accorded significant weight to Dr. Vuskovich's invalidations, and found the studies unreliable. Decision and Order at 12. Because the remaining two pulmonary function studies are non-qualifying, the administrative law judge found the pulmonary function studies did not establish total disability. Decision and Order at 26.

Contrary to the administrative law judge's characterization, Dr. Vuskovich did not invalidate the results of the results of the July 25, 2014 and August 24, 2015 pulmonary function studies. The record reveals Dr. Vuskovich reviewed the results of only one pulmonary function study conducted on July 6, 2015.[9] Director's Exhibit 13; Employer's Exhibit 2. Because the administrative law judge mischaracterized the pulmonary function study evidence, we vacate his finding that the studies do not establish total disability and remand the case for further consideration.[10] *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

In light of our decision to remand the case to the administrative law judge for reconsideration of the pulmonary function studies, we also vacate his finding that the medical opinions[11] do not establish total disability, 20 C.F.R. §718.204(b)(2)(iv), as his weighing of the pulmonary function study evidence could impact his weighing of this evidence. We are also unable to affirm the administrative law judge's basis for according less weight to Dr. Ajjarapu's opinion. He noted Dr. Ajjarapu indicated Claimant could not perform any job that was "physically labor intensive." Decision and Order at 26. The

[9] The administrative law judge noted although Dr. Vuskovich reviewed the results of a July 6, 2015 pulmonary function study, the record did not contain a pulmonary function study conducted on that date. Decision and Order at 11 n.7. The study, however, is found at page 7 of Director's Exhibit 16.

[10] The administrative law judge accurately found all three of the arterial blood gas studies (conducted on August 24, 2015, January 27, 2016, and October 24, 2016) are non-qualifying. Decision and Order at 12-13, 26; Director's Exhibits 11, 14; Claimant's Exhibit 6. He also accurately found no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 26. We therefore affirm his findings that the evidence did not establish total disability at 20 C.F.R. 20 C.F.R. §718.204(b)(2)(ii), (iii).

[11] The record includes the medical opinions of Drs. Ajjarapu, Dahhan, and Jarboe. While Dr. Ajjarapu opined Claimant does not have the pulmonary capacity to do his previous coal mine employment, Director's Exhibits 11, 12, 20, Drs. Dahhan and Jarboe opined that Claimant is not totally disabled from a pulmonary standpoint. Director's Exhibit 14; Employer's Exhibits 4, 5, 8.

administrative law judge accorded less weight to Dr. Ajjarapu's opinion because it was not clear she was aware of the exertional requirements of Claimant's job as a rock truck driver or she had any information to suggest his work was "physically labor intensive." *Id.* But in determining whether a miner is totally disabled, the administrative law judge must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). The administrative law judge erred in not making a finding regarding the exertional requirements of Claimant's job as a rock truck driver. On remand, the administrative law judge must consider all of the relevant evidence to determine the exertional requirements of Claimant's usual coal mine employment, and then compare those requirements with the physicians' assessments to determine whether the evidence establishes total respiratory disability. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

On remand, when considering whether the medical opinion evidence establishes total disability, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d 251 at 255.

Should the administrative law judge find the pulmonary function studies or medical opinions establish total disability, he must weigh all the relevant evidence together, both like and unlike, to determine whether Claimant has established the existence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

Pneumoconiosis

The administrative law judge found the evidence established clinical pneumoconiosis, but not legal pneumoconiosis. Decision and Order at 22-25. Although a finding of clinical pneumoconiosis is sufficient to support a finding of pneumoconiosis, *see* 20 C.F.R. §§718.201(a)(1), 718.202, we will address the administrative law judge's finding that the evidence did not establish legal pneumoconiosis because it could be relevant to issues the administrative law judge considers on remand.

To establish legal pneumoconiosis, Claimant must demonstrate he has 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(b). The United States Court of Appeals for the Sixth Circuit holds a miner can establish a lung impairment is significantly

related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The administrative law judge considered the medical opinions of Drs. Ajjarapu, Dahhan, and Jarboe. Dr. Ajjarapu opined Claimant has legal pneumoconiosis in the form of chronic bronchitis due to both coal mine dust exposure and smoking,[12] while Drs. Dahhan and Jarboe did not diagnose legal pneumoconiosis. Director's Exhibits 11, 12, 14, 20; Employer's Exhibits 4, 5, 8. Drs. Dahhan and Jarboe diagnosed a mild restrictive ventilatory defect due to asthma. Employer's Exhibits 4, 8.

The administrative law judge found "Dr. Ajjarapu did not point to any specific findings or objective test results in the Claimant's case to support her conclusion that his chronic bronchitis was related to his history of coal mine employment." Decision and Order at 24. He therefore found her opinion insufficient to establish legal pneumoconiosis. *Id.* But Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of chronic bronchitis based on Claimant's symptoms of daily cough with sputum production and shortness of breath, and explained that coal dust exposure causes airway inflammation, leading to bronchospasm, excessive airway secretions, and such bronchitic symptoms. Director's Exhibit 14. She also explained that coal dust particles that are deposited and not cleared by natural mechanisms become embedded in the parenchyma of airway tissues, which continue to exert and cause mucous production, even after coal mine dust exposure ceases.[13] Director's Exhibit 20. We therefore vacate the administrative law judge's finding

[12] The administrative law judge found that Claimant has a "remote and minimal" smoking history of one pack-year ending in the 1950s. Decision and Order at 6. Dr. Ajjarapu reported a smoking history of four to five cigarettes per day from 1951-1955. Director's Exhibit 11.

[13] Dr. Jarboe disagreed with Dr. Ajjarapu's statements regarding chronic bronchitis, explaining that once exposure to coal mine dust ceases, the resulting chronic cough and sputum production will clear over a relatively short time. Employer's Exhibit 4 at 2. Dr. Jarboe therefore opined that any cough and sputum production that persists after a miner leaves coal mine employment is non-occupational in origin. *Id.* The administrative law judge permissibly found Dr. Jarboe's opinion inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of*

that the medical opinions did not establish legal pneumoconiosis.[14] 20 C.F.R. §718.202(a)(4).

In summary, if the administrative law judge finds the evidence does not establish a totally disabling respiratory or pulmonary impairment on remand, he must deny benefits. However, if he finds the evidence establishes total disability, as well as fifteen years of qualifying coal mine employment, Claimant will have invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. In that case, the administrative law judge must consider whether Employer has established rebuttal of the presumption. 20 C.F.R. §718.305(d)(1)(i),(ii).

If the administrative law judge finds the evidence establishes total disability, but not at least fifteen years of qualifying coal mine employment, he must consider whether Claimant has established the remaining elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(c); *Trent*, 11 BLR at 1-27.

Va. v. Director, OWCP, 484 U.S. 135, 151; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 25.

[14] The administrative law judge permissibly accorded less weight to the opinions of Drs. Dahhan and Jarboe because he found the doctors did not adequately explain why Claimant's coal mine dust exposure did not contribute to his restrictive impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *see also Looney*, 678 F.3d at 313-14; Decision and Order at 19-20. The administrative law judge found Dr. Dahhan did not "provide any basis for his conclusion that . . . Claimant had no pulmonary impairment related to his inhalation of coal dust." Decision and Order at 25. He found that Dr. Jarboe did not discuss whether Claimant's coal mine dust exposure contributed to or aggravated his restrictive disease. *Id.* As noted, *see* n. 13, *supra*, the administrative law judge also permissibly discredited his rationale for excluding coal dust exposure as a cause of Claimant's chronic bronchitis.

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

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's decision to vacate the administrative law judge's finding that Claimant did not establish at least fifteen years of qualifying coal mine employment. I also agree with the majority's decision to vacate the administrative law judge's findings that the pulmonary function studies and medical opinions did not establish total disability. I respectfully dissent, however, from its decision to vacate the administrative law judge's finding that the medical opinions did not establish legal pneumoconiosis.

Dr. Ajjarapu is the only physician to diagnose legal pneumoconiosis, diagnosing chronic bronchitis due to both coal mine dust exposure and smoking. Director's Exhibit 12. The administrative law judge noted that Dr. Ajjarapu provided a general description of how coal mine dust exposure can cause chronic bronchitis. Decision and Order at 24. However, he accurately found that Dr. Ajjarapu did not point to "any specific findings or objective test results in . . . Claimant's case to support her conclusion that his chronic bronchitis was related to his history of coal mine employment." *Id.* The administrative law judge therefore permissibly discredited her opinion as based on generalities, rather than on

claimant's specific condition. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (physician's opinion based on generalities rather than specifics may be discredited).

Consequently, I would affirm the administrative law judge's determination that the medical opinions did not establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

JUDITH S. BOGGS, Chief
Administrative Appeals Judge