U.S. Department of Labor

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

BRB No. 19-0381 BLA

RICKY HILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 06/26/2020
	)	
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 of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

McKinnley Morgan and Gerald Vanover (Morgan, Collins, Yeast & Saylor), London, Kentucky, for claimant.

Joseph D. Halbert (Shelton, Branham & Halbert PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05077) of Administrative Law Judge Christopher Larsen 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 miner's subsequent claim filed on April 1, 2015.[1]

The administrative law judge found claimant has twenty-seven years of underground coal mine employment based on employer's concession and a totally disabling respiratory or pulmonary impairment. He therefore found claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c)[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

Employer argues the administrative law judge erred in finding claimant established total disability and thus invoked the Section 411(c)(4) presumption. Employer also argues he erred in finding it did not rebut the presumption. Claimant responds in support of the

[1] On December 1, 2009, the district director denied claimant's prior claim, filed on February 27, 2009, because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing his current claim. Director's Exhibit 3.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The district director denied claimant's prior claim because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one element of entitlement to have his case considered on the merits. 20 C.F.R. §725.309(c).

[3] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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.[5] 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).

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

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 miner's total disability is established by qualifying[6] pulmonary function studies, qualifying 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 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).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding claimant has twenty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21.

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

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

The administrative law judge summarized the two new pulmonary function studies dated October 27, 2015[7] and March 15, 2016.[8] Decision and Order at 9-10. The October 27, 2015 study Dr. Alam conducted produced qualifying results before bronchodilation and non-qualifying results after bronchodilation.[9] Director's Exhibit 8. The March 15, 2016 study Dr. Dahhan conducted produced non-qualifying results before and after bronchodilation. Director's Exhibit 10.

The administrative law judge also summarized the two new blood gas studies dated June 11, 2015 and March 15, 2016. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 10-11. The June 11, 2015 blood gas study Dr. Alam conducted produced qualifying results at rest, while the March 15, 2016 study Dr. Dahhan conducted produced non-qualifying results at rest.[10] Director's Exhibits 8, 10. Further, the administrative law judge summarized the new medical opinions of Drs. Alam, Dahhan, and Vuskovich.[11] Decision

[7] As part of the Department of Labor complete pulmonary examination, Dr. Alam administered a pulmonary function study on June 11, 2015, which both Dr. Gaziano and Dr. Vuskovich invalidated due to suboptimal effort. Director's Exhibit 8; Employer's Exhibits 2, 3. Dr. Alam readministered the pulmonary function study on October 27, 2015. Director's Exhibit 8. Dr. Gaziano validated the October 27, 2015 study, while Dr. Vuskovich invalidated it due to suboptimal effort. Director's Exhibit 8; Employer's Exhibits 2, 3.

[8] Dr. Vuskovich invalidated the March 15, 2016 pulmonary function study due to suboptimal effort. Employer's Exhibits 2, 3.

[9] The administrative law judge permissibly resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's height is seventy-three inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 9.

[10] No exercise blood gas studies were conducted. Director's Exhibits 8, 10. Dr. Gaziano opined that the June 11, 2015 blood gas study was technically acceptable. Dr. Vuskovich opined that claimant's high levels of PCO2 on this study were not related to a loss of ventilatory capacity but "probably" related to opioid medication. Employer's Exhibit 3 at 20.

[11] The administrative law judge also summarized claimant's testimony about his symptoms and exertional limitations. Decision and Order at 5-6.

and Order at 11-18. Drs. Alam[12] and Dahhan[13] opined claimant is totally disabled from a respiratory impairment, while Dr. Vuskovich[14] opined he is not. Decision and Order at 20; Director's Exhibits 8, 10; Claimant's Exhibit 1; Employer's Exhibit 1.

The administrative law judge stated that Drs. Alam and Dahhan opined claimant has a totally disabling respiratory impairment, but they and Dr. Vuskovich "disputed the respective roles [the] . . . inhalation of coal mine dust and cigarette smoking had on [claimant's] ability to do his coal mine work. . . ."[15] Decision and Order at 20; Employer's Exhibits 2, 3. Finding employer "failed to contradict the medical opinion of a totally disabling respiratory or pulmonary impairment," the administrative law judge concluded claimant established total disability and a change in an applicable condition of entitlement. Decision and Order at 20-21.

We agree with employer's position that the administrative law judge's finding of total disability cannot be affirmed. As employer correctly notes, the administrative law judge failed to render any findings with respect to the pulmonary function studies and blood gas studies, failed to address Dr. Vuskovich's opinion that claimant is not totally disabled, and failed to explain his rationale for crediting the opinions of Drs. Alam and Dahhan.

[12] Dr. Alam opined that claimant is not capable of engaging in coal mine employment. Claimant's Exhibit 1. He further opined claimant is disabled based on pulmonary function study and blood gas study evidence. Director's Exhibit 8; Claimant's Exhibit 1.

[13] Dr. Dahhan examined claimant on March 15, 2016, reviewed additional medical records, and opined that claimant has a moderate ventilatory impairment and does not retain the physiological capacity to return to his previous coal mine work. Director's Exhibit 10; Employer's Exhibit 1.

[14] Dr. Vuskovich provided a medical records review on January 23, 2018, and testified at deposition on March 15, 2018. Employer's Exhibits 2, 3. He opined that claimant has the ventilatory capacity and oxygen transfer ability to return to his coal mine job. Employer's Exhibit 2 at 11. He further opined that "[a]nybody who can generate a [sixty] percent of predicted MVV [as demonstrated by the October 27, 2015 pulmonary function study] has the ventilatory capacity to do really any type of work or physical exertion." Employer's Exhibit 3 at 16.

[15] The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the impairment is a distinct and separate issue. *See* 20 C.F.R. §§718.204(a),(c); 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

Employer's Brief at 3-6. Despite acknowledging the objective testing, the administrative law judge failed to render explicit findings with respect to the qualifying nature and validity of the pulmonary function studies and blood gas studies, and failed to weigh all relevant evidence together. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. Rather, he accepted Dr. Alam's and Dr. Dahhan's opinions without explaining the bases for his credibility findings, and failed to address Dr. Vuskovich's opinion regarding the extent of claimant's respiratory disability. Decision and Order at 20-21.

Where the administrative law judge fails to resolve the conflicts in the evidence and fails to make appropriate factual findings and credibility determinations, the proper course for the Board is to remand the case for such determinations. *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Therefore, we must vacate the administrative law judge's finding that claimant established a totally disabling respiratory impairment and remand the case for further consideration of the medical evidence in accordance with the Administrative Procedure Act (APA).[16] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). 20 C.F.R. §718.204(b)(2). Consequently, we must also vacate the administrative law judge's findings that claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption.

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the presumption invoked. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish claimant has neither legal nor clinical pneumoconiosis,[17] 20 C.F.R. §718.305(d)(1)(i), or

[16] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision include 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).

[17] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction

"no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found employer failed to establish rebuttal by each method.[18]

To disprove legal pneumoconiosis, employer must establish 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); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds that this standard requires employer to "disprove the existence of legal pneumoconiosis by showing that [claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). The "in part" standard requires employer to show that coal mine dust exposure "had at most only a *de minimis* effect on [the miner's] lung impairment." *Id.* at 407.

We agree with employer that the administrative law judge erred in applying the wrong standard to disprove legal pneumoconiosis. Employer's Brief at 7-8. The administrative law judge found Dr. Dahhan's opinion insufficient to disprove legal pneumoconiosis because he "could not rule-out some contribution of coal mine dust inhalation contributing to [his] breathing problems." Decision and Order at 24. The "no part" standard, often characterized as a requirement to "rule out" a connection between the miner's pneumoconiosis and his disability, applies to rebuttal of disability causation not disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (employer's burden on rebuttal of disability causation is to rule out coal mine employment as a cause of disability, or show that pneumoconiosis played no part in causing disability). We therefore vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing the absence of legal pneumoconiosis. *See Young*, 947 F.3d at 405-407.

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of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[18] The administrative law judge found employer established claimant does not have clinical pneumoconiosis. Decision and Order at 22. However, to rebut the presumed fact of pneumoconiosis, employer must disprove both legal and clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B).

Remand Instructions

On remand, the administrative law judge must first consider whether the new pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i) based on a weighing of all relevant evidence. In so doing, he must make a definitive finding regarding the validity of the studies and explain his determination in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. Similarly, he must consider the new blood gas studies and determine whether they establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge must also consider the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) in light of his findings regarding the pulmonary function study and the blood gas study evidence. Further, he should address the credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Rowe*, 710 F.2d at 255; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

After considering whether the pulmonary function study, blood gas study, and medical opinion evidence establish total disability, the administrative law judge must weigh all relevant evidence together to determine whether the evidence as a whole establishes total disability at 20 C.F.R. §718.204(b). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Rafferty*, 9 BLR at 1-232. The administrative law judge must set forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If claimant establishes total disability on remand, he also establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invokes the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1), (c)(1). The administrative law judge must then determine whether employer can rebut the presumption by establishing claimant has neither legal nor clinical pneumoconiosis, or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Alternatively, if the administrative law judge finds claimant is not totally disabled, claimant will have failed to establish an essential element of entitlement. *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).

Accordingly, the Decision and Order Awarding 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